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No. 126

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

AUGUST J. LIPPI, *Petitioner,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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No.

AUGUST J. LIPPI, *Petitioner,*

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THE UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

August J. Lippi, Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on March 9, 1965.

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court denying petitioner's motion for judgment of acquittal not withstanding the verdict and alternatively for a

new trial (R. Appellant's Appendix 10a-22a), printed in Appendix B hereto, infra, p. 5a, is reported in — F. Supp. —. The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, infra, p. 4a, is reported in — F. 2d —.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 9, 1965 (R. 4). Rehearing was denied on March 31, 1965 (R. 9). On April 25, 1965 application was made to Mr. Justice William J. Brennan, Jr. for an extension of time within which to file a petition for writ of certiorari. On April 26, 1965, Mr. Justice Brennan executed an order extending the time within which to file a petition for writ of certiorari in this cause to and including May 10, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether vague, uncorroborated, oral testimony concerning prior similar offenses, twenty-two years old, are sufficiently probative to outweigh their prejudicial effect on a jury, as to be admissible in a federal criminal trial, in the Government's case-in-chief.

STATUTES INVOLVED

The statutory provisions involved are the Act of June 25, 1948, C. 645, 62 Stat. 683 as amended; 18 U.S.C. § 2; the Act of June 25, 1948, C. 645, 62 Stat. 729; 18 U.S.C. § 656; the Act of June 25, 1948, C. 645, 62 Stat. 749; 18 U.S.C. § 1001; the Act of June 25, 1948, C. 645, 62 Stat. 750; 18 U.S.C. § 1005. They are printed in Appendix A, infra, pp. 1a-3a.

STATEMENT

Petitioner, August J. Lippi, President of the First National Bank of Exeter, Pennsylvania (since 1958), was indicted by a grand jury in the United States District Court for the Middle District of Pennsylvania. The indictment, in 34 counts, charged petitioner with wilfully, knowingly, and fraudulently aiding and abetting George Daileda, the Cashier of the Bank, in the misapplication of funds of the Bank. 27 counts related to petitioner's having issued checks on his account in that bank when there were insufficient funds to cover the same. According to the testimony of the key government witness, George Daileda, petitioner requested him to cover these checks for which there were insufficient funds. The evidence showed that Daileda withheld large sums from deposits made at the bank, keeping the money in his desk drawer. When petitioner's checks arrived at the bank for collection and his ledger showed insufficient funds to pay the same, Daileda would either deposit sufficient money in petitioner's account to cover these checks, using the withheld funds located in his desk drawer, or he would pick up the check and give the head teller the equivalent amount of money in cash, again out of the said withheld funds of depositors.

Petitioner was also charged in 3 counts with having aided and abetted Daileda in making of false entries in the books and records of the bank with intent to deceive the Federal Deposit Insurance Corporation and with intent to injure and defraud the bank. In the final 4 counts petitioner was charged with having knowingly, wilfully, and fraudulently filed and caused to be filed with the Comptroller of Currency false and fraudulent "Reports of Conditions" of the bank.

The indictment covered the period September, 1959 to December, 1961. Upon trial petitioner was convicted on all counts. He was sentenced to imprisonment for a term of five years; was placed on probation for a period of five years at the expiration of his imprisonment and was fined. (R. Appellant's Appendix 1).

An audit of the bank revealed a shortage in excess of $447,000.00. The charges against petitioner involved $38,976.88. Evidence disclosed that a former cashier, deceased since 1946, had misappropriated $140,000.00 or more. Although the government witness, Daileda was living far beyond his means, the remaining shortages were unaccounted for.

The government's case rested almost entirely on the testimony of the accomplice, George Daileda. On the other hand, petitioner denied any complicity with Daileda in the misapplication of bank funds. Daileda admitted that it was customary for depositors to hand tellers their deposits together with a blank deposit ticket for the teller to fill out. Petitioner testified that it was his practice to have his secretary make out his checks in his Wilkes-Barre office and run an adding machine tape on them. The secretary, who corroborated this information, would then inform petitioner of the total sum and would receive instructions not to mail the checks until a deposit had been made by petitioner. Mr. Lippi would then stop at the Exeter Bank and hand the cash to George Daileda to have him deposit it to petitioner's checking account. It was the argument of the defense that undoubtedly Daileda pocketed this money and then used the withheld funds in his desk drawer to pay for petitioner's checks. (Tr. Vol. II, 551-572; 631-638).

The issue of credibility was critical at trial. Over objection the government introduced evidence of prior

similar offenses by Lippi (Tr. Vol. 1, pp. 128-141). This testimony was adduced through Daileda who testified that in 1942, petitioner requested him to cover certain checks which he had to pay, using bank funds. Without any specificity Daileda stated that in the first year he used approximately $6,000.00 for this purpose; that petitioner told him he would pay it back shortly and did in fact pay the money back within nine months; that this practice continued through the 1940's with the amount withheld ranging around six or seven thousand dollars, and the moneys being repaid within the same period of time; that during the 1950's, the sums became larger, going as high as $20,000.00, and petitioner repaying the same within a year and a half. The government was unable to offer any documentary evidence to support this charge nor was its witness able to specify dates, amounts or names of payees.

The Court instructed the jury that the evidence was not to be used by them as proof of the guilt of petitioner of the crimes with which he was charged, but was to be used solely by them as relevant evidence on the issues of knowledge and intent of the crimes charged in the indictment.

The Third Circuit Court of Appeals found no error with respect to this point, noting the careful instruction which had been given by the trial court to the jury.

REASONS FOR GRANTING THE WRIT

Although this Court has been reluctant to consider the use and application of rules of evidence in criminal trials under its role as supervisor of the administration of criminal justice within the federal system, an important point is presented herewith. *Michelson* v. *United States,* 335 U.S. 469, at 486.

All courts and treatise writers agree that the government in its case-in-chief may introduce evidence of prior similar criminal offenses by the defendant if they are relevant to a determination of one of the elements of the crime with which he is charged. More often than not, it is used to show evidence of knowledge, intent, plan or design, and identity. It is in the application of the rule that there is great diversity of approach and opinion. *Wigmore* (3rd Ed.) Volume 2, § 300 et seq.

Involved herein also is the critical issue of what quantum of proof is necessary for the admissibility of a prior similar offense.

The dangers in permitting this type of evidence in cases where it is either not applicable or the quantum of proof is extremely limited are obvious. It not only tends to unfairly prejudice the defendant before the jury, but presents the real danger that the jury will leap to the conclusion that the defendant is guilty of the crime with which he is charged because of his prior alleged guilt. *Boyd* v. *United States,* 142 U.S. 450. In addition it compels the defendant to take the stand to deny charges for which he is not indicted. Qualifying instructions, no matter how carefully worded, cannot erase the attack which the government has made on the defendant's character and reputation.

As indicated above, intertwined with this problem is the issue of quantum of proof. The Eighth and First Circuits require that proof of another offense not inseparably connected with the crime charged, must be clear, plain and conclusive. Evidence of a vague and uncertain character regarding such an alleged offense is never admissible. *Kraft* v. *United States,* 8th Cir.,

238 F. 2d 794, at 801, 802. Other Circuits have inferred that the only test of admissibility is one of relevance.

The instant case is particularly suitable for a discussion of this rule of evidence. The prior offense was allegedly committed 22 years previously. No one would expect petitioner to have kept bank statements and deposit slips for this lengthy period of time.

Daileda's charges, without any specificity or corroboration, made it an impossible task for petitioner to refute the same except by a general denial. On the other hand, the jury was left with the impression that defendant had been misapplying bank funds for 22 years with intent to defraud, and in all probability they concluded that he must be guilty of the crimes with which he was charged.

It is the vagueness, the distance in point of time, of the alleged prior offense that ought not to be countenanced because of the overwhelming prejudice resulting therefrom. The prejudice clearly outweighed the probative value of the proffered evidence.

The rule of evidence was also misapplied in the instant case. It cannot be doubted that had these misappropriations by Daileda, for the benefit of petitioner, occurred without any repayment by petitioner, the evidence would clearly have been relevant to negative an innocent intent with respect to the crimes with which he was charged. However, Daileda's testimony that petitioner repaid all of the money which Daileda had used to cover overdrafts, could not possibly be relevant to the issue of petitioner's specific intent to injure and defaud the Bank of Exeter during the indictment period. In fact, the evidence would probably

have been admissible if offered by the defendant to negate his alleged criminal intent. Cf. *Brinegar* v. *United States,* 338 U.S. 160, at 172-74; *Harper* v. *United States,* 99 U.S. App. D.C. 324, 239 F. 2d 945.

It is respectfully submitted that the instant case presents an excellent situation for a definitive analysis of the public policy involved in the use, application, and quantum of proof of the rule of evidence which permits prior criminal offenses to be introduced by the government in its case-in-chief.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Act of June 25, 1948, c. 645, 62 Stat. 683, 729 as amended, 18 U.S.C. § 2, 656.

§ 2. Principals

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

§ 656. Theft, embezzlement, or misapplication by bank officer or employee

Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank and trust company which has become a member of one of the Federal Reserve banks; and "insured bank"

includes any bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation.

Act of June 25, 1948, c. 645, 62 Stat. 749; 18 U.S.C. § 1001.

§ 1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Act of June 25, 1948, c. 645, 62 Stat. 750; 18 U.S.C. § 1005.

§ 1005. Bank entries, reports and transactions

Whoever, being an officer, director, agent or employee of any Federal Reserve bank, member bank, national bank or insured bank, without authority from the directors of such bank, issues or puts in circulation any notes of such bank; or

Whoever, without such authority, makes, draws, issues, puts forth, or assigns any certificate of deposit, draft, order, bill of exchange, acceptance, note, debenture, bond, or other obligation, or mortgage, judgment or decree; or

Whoever makes any false entry in any book, report, or statement of such bank with intent to injure or defraud such bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such bank, or the Comptroller of the Currency, or the Federal

Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such bank, or the Board of Governors of the Federal Reserve System—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank or trust company, which has become a member of one of the Federal Reserve banks; and "insured bank" includes any state bank, banking association, trust company, savings bank, or other banking institution, the deposits of which are insured by the Federal Deposit Insurance Corporation.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14971

UNITED STATES OF AMERICA

v.

GEORGE J. DAILEDA and AUGUST J. LIPPI

AUGUST J. LIPPI, *Appellant*

Appeal From the United States District Court for the Middle District of Pennsylvania

Argued January 22, 1965

Before McLAUGHLIN, FORMAN and GANEY, *Circuit Judges.*

Opinion of the Court

(Filed March 9, 1965)

PER CURIAM.

Appellant, President of the bank involved, was convicted of wilfully, knowingly and fraudulently aiding the cashier of the bank (indicted with him) in the misapplication of funds of the bank, in the making of false entries in the books and records of the bank in connection with same and of knowingly, wilfully and fraudulently filing and causing to be filed with the Comptroller of Currency false and fraudulent "Reports of Conditions" of the bank. He was convicted on all thirty-four counts in the indictment. The cashier entered a plea of guilty to all counts and testified in the Government's case at defendant's trial.

We agree with the trial judge that there was ample evidence to warrant the submission of the question of defendant's guilt on all counts to the jury. The evidence of alleged prior offenses was allowed under the careful instructions of the judge which limited it to the purpose of show-

ing intent and knowledge during the indictment period. There was no error in the court's ruling in that regard. Nor was there any error in the court's refusal to permit palpably improper cross-examination of the cashier.

The judgment of the district could will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 13711 Criminal

UNITED STATES OF AMERICA, *Plaintiff*

v.

GEORGE J. DAILEDA and AUGUST J. LIPPI, *Defendants*

Opinion

The defendant, August J. Lippi, having been tried by a jury and convicted on 34 Counts of violations of Title 18 U.S.C. §§ 2, 656, 1001 and 1005, has filed this motion for judgment of acquittal and, in the alternative, a new trial.

The defendant, President of the First National Bank of Exeter, Pennsylvania, was indicted together with George Daileda, Cashier of the Bank, but at the time of arraignment Daileda entered a plea of guilty to the 34 Counts in the indictment and subsequently testified for the Government at the defendant's trial.

The indictment charged the defendant, in the first 27 Counts, with having

(a) Willfully, knowingly and fraudulently aided and abetted George J. Daileda, who was the cashier of said

bank, in the misapplication of funds of the said bank by drawing and presenting for payment at the said bank various checks, at a time when he knew that he did not have sufficient funds in his account to pay said checks, and inducing, aiding and abetting the said Daileda to misapply funds of the bank to cover said checks, with intent to defraud and injure the said First National Bank of Exeter, in violation of 18 U.S.C. 2 [1] and 18 U.S.C. 656;

in Counts 28, 29 and 30, with having

(b) Willfully, knowingly and fraudulently aided and abetted the said Daileda in the making of false entries in the books and records of The First National Bank of Exeter with intent to deceive the Federal Deposit Insurance Corporation and agents and examiners thereof, and with intent to injure and defraud the said First National Bank of Exeter, in violation of 18 U.S.C. 2 and 18 U.S.C. 1005;

and in Counts 31, 32, 33 and 34, with having

(c) Knowingly, willfully and fraudulently filed and caused to be filed with the Comptroller of Currency false and fraudulent "Reports of Conditions" of the First National Bank of Exeter, in violation of 18 U.S.C. 1001.

The reasons assigned by defendant will be considered in the following order:

• • • • • • • • • • •

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[1] Title 18 U.S.C. 2, the aiding and abetting statute provides:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

"(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

Motion for a New Trial

The numerous reasons assigned in support of the motion for a new trial can be distilled into three principal arguments: (a) the Court erred in admitting evidence of alleged prior similar offenses, (b) the Court erred in restricting the cross-examination of a Government witness, and (c) the Court erred in not permitting a psychiatrist to testify as to the credibility and bias of a Government witness.

As to the evidence of alleged prior similar offenses, the Government witness Daileda was allowed to testify that in 1942, while defendant was building an apartment over his garage, he came to Daileda, told him he didn't have enough funds and asked Daileda to make good some checks he was going to use to pay these building expenses. Daileda covered checks amounting to approximately $6,000, after explaining to defendant that he would have to use bank funds. Defendant paid the $6,000 back in approximately nine months. At the time this testimony was received, the Court specifically instructed the jury that the evidence was being allowed for a limited purpose, i.e., for the purpose of showing intent and knowledge during the indictment period from September, 1959, to January, 1962, when the misapplications were being made by Daileda. The Court advised the jury, inter alia:

> " . . . We are going to allow testimony concerning acts or discussions or events prior to 1959, but solely for the purpose of bearing on the defendant's knowledge and on the defendant's intent, and not in any way to be considered by you as establishing the commission of crimes during the period 1942 to 1959. We're not concerned with crimes or offenses as such during that period. We are concerned with whether or not this defendant is guilty of the crimes with which he's been charged during the period 1959 to 1962, and to that extent and toward that end we will allow this witness to testify how this alleged scheme or plan originated, and, once again, to be considered by you solely as bear-

ing upon the intent and knowledge of this defendant relative to the crimes with which he's been charged during the period 1959 to 1962, and for that limited purpose we will allow this testimony and we will overrule the objection of the defendant." (N. T. 136-137)

Subsequently, during the charge of the Court, this admonition was repeated. This testimony was allowed because it was germane to the issue of knowledge and intent. Daileda's testimony was to the effect that this collaboration with the defendant had its beginning in 1942 and continued through the 1940's and 1950's, up to January, 1962, and that during this period he repeatedly told defendant that he was using bank funds and insisted that the funds be restored. So that when the transactions during the indictment period came into being, a well formulated plan of operation, known to defendant, was already in existence. Therefore, concerning the knowledge and intent of defendant from September, 1959, to January, 1962, this evidence was extremely pertinent and the jury should have had the benefit of it.

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/s/ WILLIAM J. NEALON
Judge